

# The Scarlet Letter and the Military Justice System

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## Introduction

Adultery as a criminal offense in the military justice system is a controversial topic of late, attracting attention from the general public, the Congress, and the media.<sup>1</sup> A major problem for all concerned is that the reportage has not always accurately described the military offense of adultery or its place in the military justice system.<sup>2</sup> The purpose of this article is to inform the military justice practitioner concerning the offense of adultery as it is recognized by military law. The article will first consider the concept of adultery independent of the substantive criminal law.<sup>3</sup> It will then examine the military offense of adultery, beginning with those characteristics of the offense that are common to proscriptions of this type.<sup>4</sup> The article will then discuss those aspects of the military offense of adultery most likely to challenge practitioners and surprise commentators: the requirement for proof of prejudicial or discrediting effects stemming from the adulterous conduct;<sup>5</sup> the limitation of the offense to acts of wrongful intercourse;<sup>6</sup> and the relationship of adultery to other sexual offenses recognized in the military justice system.<sup>7</sup> This article is not intended to be a comprehensive treatise concerning the criminal aspects of adultery, nor is it a critical treatment of the topic. The primary goal in publishing

this work is to provide the interested reader with an introduction to the military offense of adultery, from which additional research may be launched or critical opinions formed.<sup>8</sup>

## What Is Adultery?

The word adultery is derived from the Latin verb *adulterare*, which means to alter, pollute, or defile.<sup>9</sup> At common law, the term came to be applied to "illicit intercourse . . . calculated to adulterate the blood."<sup>10</sup> As such, "[t]he essence of adultery . . . was . . . intercourse with a married woman, which tended to adulterate the issue of an innocent husband, to turn inheritance away from his own blood to that of a stranger, and to expose him to support and provide for another man's issue."<sup>11</sup> Over time, adultery came to describe a broader range of sexual conduct, typically including all instances of "voluntary sexual intercourse of a married person with a person other than the offender's husband or wife."<sup>12</sup> Regardless of the precise contours of the concept, the gist of adultery remains unchanged; it describes a breach of the marital relationship by means of sexual intercourse.<sup>13</sup>

## The Crime of Adultery

1. See, e.g., Dana Priest and Bradley Graham, *Past Adultery Won't Disqualify Candidate To Lead Joint Chiefs*, WASH. POST, June 5, 1997, at A1; Gregory L. Vistica and Evan Thomas, *Sex And Lies: The Strange Case Of Lieutenant Flinn Is Over, But In The Military The War Over Women Goes On*, NEWSWEEK, June 2, 1997, at 26.

2. See, e.g., Tamara Jones, *The Pilot's Cloudy Future: She Was the First Woman to Fly a B-52. Then She Fell in Love and the Sky Fell In*, WASH. POST, Apr. 29, 1997, at D1 (asserting that adultery is a "felony" under military law).

3. See *infra* notes 9-13 and accompanying text.

4. See *infra* notes 14-29 and accompanying text.

5. See *infra* notes 30-49 and accompanying text.

6. See *infra* notes 50-61 and accompanying text.

7. See *infra* notes 62-67 and accompanying text.

8. This is not to say that I have refrained from all critical commentary relating to the military offense of adultery or its treatment by the courts. I merely wish to emphasize the abecedarian nature of the work and that its target audience is the counsel in the field who needs a primer on the topic.

9. See WEBSTER'S DICTIONARY OF WORD ORIGINS 4 (1991).

10. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 454 (3d ed. 1982).

11. 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 214, at 354 n.4 (quoting *Evans v. Murff*, 135 F. Supp. 907 (D. Md. 1955)); PERKINS & BOYCE, *supra* note 10, at 454.

12. BLACK'S LAW DICTIONARY 47 (5th ed. 1979); see RANDOM HOUSE COLLEGE DICTIONARY 19 (rev. ed. 1982). In contrast to this "gender-neutral" formulation, Professors Perkins and Boyce observed that "in the common law view illicit intercourse was adultery by both if the woman was married (whether the man was married or single) and was fornication by both if the woman was single." PERKINS & BOYCE, *supra* note 10, at 454; TORCIA, *supra* note 11, § 217, at 361. But cf. *United States v. Hickson*, 22 M.J. 146, 150 (C.M.A. 1986) (describing treatment of adultery and fornication in military law).

Adultery has been the subject of various prohibitions since Biblical times.<sup>14</sup> Canon law prohibited adultery, but the common law generally did not recognize adultery as a crime “unless the conduct was open and notorious, in which case it was punishable as a public nuisance.”<sup>15</sup> Many jurisdictions in the United States nevertheless enacted statutory prohibitions against adultery,<sup>16</sup> some of which remain in effect today.<sup>17</sup> There is not, however, an express prohibition of adultery in the United States Code.<sup>18</sup>

Military law nevertheless recognizes the offense of adultery.<sup>19</sup> The elements of the offense are described in the following manner by the *Manual for Courts-Martial*:

- (1) That the accused wrongfully had sexual intercourse with a certain person;
- (2) That, at the time, the accused or the other person was married to someone else; and
- (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces

or was of a nature to bring discredit upon the armed forces.<sup>20</sup>

As such, the military offense of adultery is very similar to the contemporary civilian definition of adultery described above,<sup>21</sup> while at the same time possessing unique requirements of proof that narrow its scope and applicability.<sup>22</sup>

### Adultery: The General Part

The military offense of adultery generally prohibits sexual intercourse between two persons “if either is married to a third person.”<sup>23</sup> Culpability does not depend upon the accused’s marital status; it is sufficient if either partner to the intercourse “is married to a third person.”<sup>24</sup> It is likewise a gender-neutral prohibition; the accused may therefore be either male or female.<sup>25</sup> Moreover, the offense requires only a single act of sexual intercourse,<sup>26</sup> and “[a]ny penetration, however slight, is sufficient to complete the offense.”<sup>27</sup> As a result, it is also unnecessary to establish, as required by some civil penal statutes, that the adulterous intercourse was either “habitual” or in conjunction with unlawful cohabitation by the parties.<sup>28</sup> This expansive defini-

13. Cf. TORCIA, *supra* note 11, § 214, at 354 (“The gist of the offense in the ecclesiastical courts was the breach of the marriage vow.”).

14. See Exodus 20:14; Deuteronomy 5:18.

15. TORCIA, *supra* note 11, § 214, at 353-54; see PERKINS & BOYCE, *supra* note 10, at 454.

16. PERKINS & BOYCE, *supra* note 10, at 455 & n.18 (observing that “adultery was made an offense in a little over half the states”). These prohibitions took a variety of forms; for a survey of the common types of adultery offenses, see TORCIA, *supra* note 11, § 215, at 355-58.

17. E.g., IDAHO CODE § 18-6601 (1996); KAN. STAT. ANN. § 21-3507 (1995); N.Y. PENAL LAW § 255.17 (McKinney 1989); VA. CODE ANN. § 18.2-365 (Michie 1996); cf. MISS. CODE ANN. § 97-29-1 (1996) (prohibiting unlawful adulterous cohabitation); N.C. GEN. STAT. § 14-184 (1996) (prohibiting habitual sexual intercourse in the manner of husband and wife by a man and woman not married to each other).

18. The United States Congress had, at one time, enacted a statutory prohibition against adultery that was codified in Title 18 of the United States Code, but that provision was later repealed. *United States v. Hickson*, 22 M.J. 146, 147-48 (C.M.A. 1986). The federal offense of adultery prohibited intercourse between a married woman and an unmarried man, as well as that between a married man and an unmarried woman. *Id.* at 147 n.3 (quoting 18 U.S.C. § 516 (repealed 1948)).

19. *United States v. Butler*, 5 C.M.R. 213, 215 (A.B.R. 1952); MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 62 (1995) [hereinafter MCM]. In *Butler*, the Army Board of Review observed that “adultery is not specifically denounced as an offense by the Uniform Code of Military Justice,” but concluded that “the offense is certainly embraced within the purview of Article 134 of the Code as ‘conduct of a nature to bring discredit upon the armed forces,’ if not a crime and offense not capital.” 5 C.M.R. at 215.

20. MCM, *supra* note 19, pt. IV, ¶ 62b. “In the case of officers, adultery can be charged alternatively as conduct unbecoming an officer, under Article 133, Uniform Code of Military Justice, 10 U.S.C. § 933.” *United States v. King*, 34 M.J. 95, 96 n.1 (C.M.A. 1992). In such circumstances, the government must establish beyond a reasonable doubt that the adultery constituted conduct unbecoming an officer and gentleman rather than conduct prejudicial or discrediting to the armed forces. See MCM, *supra* note 19, pt. IV, ¶ 59b(2).

21. See *supra* notes 9-13 and accompanying text.

22. See *infra* notes 30-61 and accompanying text.

23. *United States v. Hickson*, 22 M.J. 146, 150 (C.M.A. 1986).

24. *Id.*

25. See MCM, *supra* note 19, pt. IV, ¶ 64b.

26. See U.S. DEP’T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES’ BENCHBOOK, para. 3-62-1d, at 573 (30 Sept. 1996) [hereinafter BENCHBOOK].

27. See *id.*; cf. MCM, *supra* note 19, pt. IV, ¶ 45c(1)(a) (defining intercourse in the context of rape and carnal knowledge). Professor Torcia further opines that “[t]he intercourse need not result in an emission.” TORCIA, *supra* note 11, § 214, at 354.

tion of the military offense of adultery appears to provide comprehensive protection to the marital relationship and “the morals of society, rather than the person of one of the participants.”<sup>29</sup>

### Prejudicial, Discrediting, or Unbecoming Conduct

There are, however, a number of characteristics of the military offense of adultery that may limit its scope and applicability. As a threshold matter, it is important to remember that Congress has not expressly proscribed adultery under the Uniform Code of Military Justice (UCMJ).<sup>30</sup> The military offense of adultery typically arises under Article 134, UCMJ,<sup>31</sup> which provides that courts-martial shall take cognizance of “all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital.”<sup>32</sup> The Court of Military Appeals (COMA) has also noted that “[i]n the case of officers, adultery can be charged alternatively as conduct unbecoming an officer under Article 133.”<sup>33</sup> In either case, the prosecution must not only establish the general part of adultery beyond a reasonable doubt, but also the unique requirements of proof associated with the General Articles.<sup>34</sup> Alternatively stated, adultery is not a military offense in the absence of prejudice to good order and discipline, a tendency to bring discredit upon the armed forces, or, in the case of an officer charged under Article 133, unbecoming conduct.<sup>35</sup>

The requirement that the adultery be prejudicial, discrediting, or unbecoming is not insignificant.<sup>36</sup> The prejudice to good order and discipline associated with a particular act of adultery must be “reasonably direct and palpable”;<sup>37</sup> remote or indirect prejudice stemming from the illicit intercourse will not be sufficient to establish this element.<sup>38</sup> Direct and palpable prejudice may include, but is not limited to, actual or potential marital discord and strife, discord and strife with a sexual partner who is not made aware that one is married to another, compromise of the respect due to military authority, or causing “other soldiers to be less likely to conform their conduct to the rigors of military discipline.”<sup>39</sup>

Discredit requires a different analysis. The statutory text requires only that the conduct “be of a nature to bring discredit upon the armed forces” to be punishable under Article 134.<sup>40</sup> The *Manual for Courts-Martial* explains that “[t]his clause . . . makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem.”<sup>41</sup> This focus upon the “nature” or “tendency” of the illicit intercourse to discredit the armed forces stands in apparent contrast to the requirement for “direct and palpable” prejudice under clause one, Article 134. However, the practical effect of this distinction may be reduced by commonly-cited precedent asserting that “Congress has not intended by Article 134 . . . to regulate wholly private moral conduct of an individual,”<sup>42</sup> and as such “[c]ivilians must be aware of the behavior and the military status of the offender.”<sup>43</sup> Among the factors

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28. For example, South Carolina defines adultery as “the living together and carnal intercourse with each other or habitual carnal intercourse with each other without living together of a man and woman when either is lawfully married to some other person,” S.C. CODE ANN. § 16-15-70 (Law Co-Op. 1996), and provides that “[a]ny man or woman who shall be guilty of the crime of adultery or fornication shall be liable to indictment and, on conviction, shall be severally punished by a fine of not less than one hundred dollars nor more than five hundred dollars or imprisonment for not less than six months nor more than one year or by both fine and imprisonment, at the discretion of the court.” *Id.* § 16-15-60.

29. *United States v. Ambalada*, 1 M.J. 1132, 1137 (N.C.M.R. 1977).

30. *See generally* 10 U.S.C. §§ 801-946 (1988); *see United States v. Butler*, 5 C.M.R. 213, 215 (A.B.R. 1952).

31. *Butler*, 5 C.M.R. at 215; MCM, *supra* note 19, pt. IV, ¶ 62.

32. UCMJ art. 134 (1995).

33. *United States v. King*, 34 M.J. 95, 96 n.1 (C.M.A. 1992).

34. MCM, *supra* note 19, pt. IV, ¶¶ 59-60; *see United States v. Poole*, 39 M.J. 819, 821 (A.C.M.R. 1994).

35. *See BENCHBOOK*, *supra* note 26, para. 3-62-1d. *But cf.* UCMJ art. 80 (1995) (providing that anyone attempting to commit an offense under the UCMJ “shall be punished as a court-martial may direct”); *United States v. St. Fort*, 26 M.J. 764, 766 (A.C.M.R. 1988) (affirming conviction for attempted adultery); MCM, *supra* note 19, pt. IV, ¶ 62d (describing attempts as lesser-included offense to adultery).

36. *See Poole*, 39 M.J. at 821 (indicating that adultery is not inherently prejudicial to good order and discipline and requires “an assessment of the circumstances surrounding the commission of the offense in making the determination”).

37. MCM, *supra* note 19, pt. IV, ¶ 60c(2)(a).

38. *Id.*

39. *United States v. Green*, 39 M.J. 606, 609-10 (A.C.M.R. 1994).

40. UCMJ art. 134 (1995).

41. MCM, *supra* note 19, pt. IV, ¶ 60c(3).

identified by the military appellate courts as relevant to the determination are the identity and military status of the participants, the location and circumstances of the intercourse, and local law or community standards concerning the relevant conduct.<sup>44</sup>

The prosecution faces a similar challenge if the accused is an officer charged with unbecoming conduct in violation of Article 133. In addition to establishing the general part of adultery,<sup>45</sup> the evidence must also establish that the illicit intercourse “constituted conduct unbecoming an officer.”<sup>46</sup> To be “unbecoming,” the circumstances of the intercourse must not only dishonor or disgrace the officer personally, but also “seriously compromise the person’s standing as an officer.”<sup>47</sup> The ultimate effect of a failure-of-proof on this unique element is minimized, however, by two characteristics of the law concerning the General Articles. First, the Court of Appeals for the Armed Forces recently observed that “[a]s a matter of law, it is well-established that, when the underlying conduct is the same, a service discredit or disorder under Article 134 is a lesser-included offense of conduct unbecoming an officer under Article 133.”<sup>48</sup> Moreover, the maximum punishment is the same for the greater and lesser-included offenses.<sup>49</sup> As a result, there may be little practical difference between charging an officer with adultery as unbecoming conduct under Article 133, or

with prejudicial or discrediting conduct in violation of Article 134.

## Wrongful Sexual Intercourse

The military offense of adultery also requires proof beyond a reasonable doubt that the accused engaged in *wrongful* sexual intercourse with another person.<sup>50</sup> In *United States v. King*,<sup>51</sup> the COMA explained that this requirement of wrongful intercourse has two components: “[t]he wrongfulness of the act obviously relates to mens rea (not elsewhere specified amongst the elements) and lack of a defense, such as excuse or justification.”<sup>52</sup> An evident, but often overlooked, ramification of this statement is that the military offense of adultery *does* have a mental component; it is not a purely strict-liability crime. Also implied by the court’s assertion is that an excuse or justification may negate the wrongfulness of an act of intercourse.

The military justice practitioner is most likely to encounter issues of this sort when a person accused of adultery claims ignorance or mistake relating to marital status,<sup>53</sup> either their own or that of their partner in intercourse.<sup>54</sup> It is a defense to adultery “that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the

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42. *United States v. Snyder*, 4 C.M.R. 15, 19 (C.M.A. 1952).

43. *United States v. Perez*, 33 M.J. 1050, 1054 (A.C.M.R. 1991) (citing *United States v. Kirksey*, 20 C.M.R. 272 (C.M.A. 1955)).

44. *See id.* In *Perez*, the Army court also observed that “[w]hile the appellant was still technically married to his wife, the separation agreement would appear to permit sexual intercourse with another woman without violating the sanctity of the marriage contract.” *Id.*

45. This requirement is set forth in the *Manual* as follows:

Whenever the offense charged is the same as a specific offense set forth in this Manual, the elements of proof are the same as those set forth in the paragraph which treats that specific offense, with the additional requirement that the act of omission constitutes conduct unbecoming an officer and gentleman.

MCM, *supra* note 19, pt. IV, ¶ 59c(2).

46. *Id.* ¶ 59b(2). The complete statement of the element contained in the *Manual* uses the language “officer and a gentleman.” The term “gentleman” is a redundant anachronism in that it includes “both male and female commissioned officers, cadets, and midshipmen.” *Id.* ¶ 59c(1).

47. *Id.* ¶ 59c(2).

48. *United States v. Harwood*, 46 M.J. 26, 28 (1997) (citing *United States v. Rodriguez*, 18 M.J. 363 (C.M.A. 1984)).

49. Compare MCM, *supra* note 19, pt. IV, ¶ 59e with *id.* ¶ 62e. Adultery is punishable by a “dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year.” *Id.* ¶ 62e. In spite of assertions to the contrary, *see, e.g., Jones, supra* note 2, at D3 (asserting adultery is a “felony” offense under military law), the federal law of criminal procedure classifies such an offense as a class A misdemeanor. *See* 18 U.S.C. § 3559(a)(6) (1996).

50. MCM, *supra* note 19, pt. IV, ¶ 62b(1).

51. 34 M.J. 95 (C.M.A. 1992).

52. *Id.* at 97.

53. *Cf.* MCM, *supra* note 19, R.C.M. 916(j) (describing defense of ignorance or mistake of fact in military law). This is not to say that ignorance or mistake of fact or law is the *only* defense that may be relevant to allegations of adultery; for example, one could engage in what would otherwise be adulterous conduct, but avoid criminal liability if participation in the offense was caused by coercion or duress. *See id.* R.C.M. 916(h).

54. *Id.* pt. IV, ¶ 62b(2).

accused would not be guilty of the offense.”<sup>55</sup> Because the offense of adultery does not require a specific intent or actual knowledge of any particular fact, the incorrect belief must therefore be both honest and reasonable.<sup>56</sup>

Exculpatory ignorance or mistake may take a variety of forms. For example, the incorrect belief may relate to factual matters, such as the performance of a marriage ceremony or the identity of a sexual partner.<sup>57</sup> Alternatively, the ignorance or mistake may concern the legal effect of a ceremony, proceeding, or documents.<sup>58</sup> Its precise form is of minimal importance;<sup>59</sup> to be exculpatory, the incorrect belief need only “have existed in the mind of the accused[,] . . . been reasonable under all the circumstances,” and be such that the accused would not be guilty of adultery “if the circumstances were as the accused believed them.”<sup>60</sup> Such a belief may operate to excuse an otherwise wrongful act of adultery.<sup>61</sup>

### Adultery And Other Sexual Offenses

The relationship between adultery and other military sexual offenses is best introduced by this passage from the COMA opinion in *United States v. Hickson*:<sup>62</sup>

In summary, the treatment of adultery and fornication in military law seems to be this: (a) two persons are guilty of adultery whenever they engage in illicit sexual intercourse if either of them is married to a third person; (b) if unmarried, they are guilty of fornication whenever they engage in illicit sexual intercourse under circumstances in which the conduct is not strictly private; and (c) private sexual intercourse between unmarried persons is not punishable.<sup>63</sup>

The relationship between adultery and other military sexual offenses requiring intercourse cannot be stated as certainly or succinctly. Adultery appears to be a separate offense from carnal knowledge because the former requires proof that one party to the intercourse is married to another,<sup>64</sup> while carnal knowledge requires proof that one party is under 16 years of age.<sup>65</sup> Likewise, recent precedent holds that adultery is a separate offense from rape; the marital relationship of the parties to the intercourse is now irrelevant to a charge of rape, and rape requires force and lack of consent.<sup>66</sup> In most circumstances, an accused may be separately charged, convicted, and punished for the offenses of adultery and either carnal knowledge or rape, even if they arise from the same criminal act or transaction.<sup>67</sup>

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55. MCM, *supra* note 19, R.C.M. 916(j); *see United States v. Fogarty*, 35 M.J. 885, 892 (A.C.M.R. 1992).

56. BENCHBOOK, *supra* note 26, para. 3-62-1d note 4, at 574; *see MCM, supra* note 19, R.C.M. 916(j). *But cf. Fogarty*, 35 M.J. at 892 (making no mention of reasonableness requirement).

57. *See MCM, supra* note 19, R.C.M. 916(j); 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 62(e) (1984).

58. *See MCM, supra* note 19, R.C.M. 916(l)(1) discussion; ROBINSON, *supra* note 57, § 62(e); *cf. BENCHBOOK, supra* note 26, para. 3-62-1d note 4 (characterizing mistaken belief that “divorce was final based on legal documents he/she received” as mistake of fact).

59. Professor Robinson has observed that “the distinction between mistakes of fact and mistakes of law . . . has proven very troublesome in practice,” and concludes that “the difference between these mistakes is not significant in determining culpability, and the mistakes should be treated identically.” ROBINSON, *supra* note 57, § 62(e). Professors LaFave and Scott call the basic rule “extremely simple” and explain that “ignorance or mistake of fact or law is a defense when it negatives the existence of a mental state essential to the crime charged.” 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 5.1(a), at 575 (1986). While the Rules for Courts-Martial provide that “[i]gnorance or mistake of law . . . ordinarily is not a defense,” R.C.M. 916(l)(1), the military appellate courts have “expressly adopt[ed] the view that the defense of mistake of law . . . is available to one accused of crime in the military establishment.” *United States v. Sicley*, 20 C.M.R. 118, 127 (C.M.A. 1955). The discussion accompanying R.C.M. 916(l)(1) grudgingly recognizes the precedent stated in *Sicley* when it states that “[i]gnorance or mistake of law may be a defense in some limited circumstances.” The discussion then identifies two mistakes of law that may be exculpatory in a prosecution involving adultery. The accused may be mistaken as to a separate non-penal law and lack the criminal intent or state of mind necessary to establish guilt, or the incorrect belief may be caused by “reliance upon the decision or pronouncement of an authorized public official or agency.” MCM, *supra* note 19, R.C.M. 916(l)(1) discussion. For an expanded treatment of potentially exculpatory mistakes of law, *see LAFAVE & SCOTT, supra*, § 5.1.

60. MCM, *supra* note 19, R.C.M. 916(j); *see BENCHBOOK, supra* note 26, paras. 3-62-1d note 4 & 5-11-2. *But cf. BENCHBOOK, supra* note 26, para. 5-11-2 (providing that the ignorance or mistake “cannot be based on a negligent failure to discover the true facts”).

61. *See United States v. Fogarty*, 35 M.J. 885, 892 (A.C.M.R. 1992).

62. 22 M.J. 146 (C.M.A. 1986).

63. *Id.* at 150.

64. MCM, *supra* note 19, pt. IV, ¶ 62b(2).

65. *Id.* ¶ 45b(2).

66. *United States v. Mason*, 42 M.J. 584, 586 (Army Ct. Crim. App.) (questioning rationale of holding to the contrary in *Hickson*, 22 M.J. 146), *rev. denied*, 43 M.J. 166 (1995).

## Conclusion

The military justice system recognizes the offense of adultery.<sup>68</sup> The general part of the offense prohibits sexual intercourse between two persons “if either is married to a third person.”<sup>69</sup> The reach of the criminal sanction is limited, however, to instances of wrongful intercourse<sup>70</sup> that cause either prejudicial or discrediting effects to the armed forces.<sup>71</sup> The military offense of adultery is therefore nothing more than a particularized form of that general proscription of “disorders and neglects to the prejudice of good order and discipline in the armed forces” and “conduct of a nature to bring discredit upon the armed forces.”<sup>72</sup>

Some have questioned the need for such an offense, observing that it has no counterpart in civilian jurisprudence.<sup>73</sup> Such observations overlook the fact that it is the unique mission of the military to fight or prepare to fight wars;<sup>74</sup> the demanding nature of that task necessitates that “[i]n military life there is a higher code termed honor, which holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code.”<sup>75</sup> The military offense of adultery is simply a recognition of this moral dimension to military service, and is evidence that the military justice system is flexible enough to recognize the judgment of the military community “concerning that which is honorable, decent, and right.”<sup>76</sup>

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67. It is unclear whether trial counsel could plead sufficient facts in a specification alleging rape or carnal knowledge and thereby “convert” adultery into a lesser-included offense. *Cf.* *United States v. Weymouth*, 43 M.J. 329, 337 n.5 (1995) (observing that “[w]e need not decide here if the Government could create a lesser offense merely by alleging extra, non-essential elements”); *United States v. Ureta*, 41 M.J. 571, 580 (A.F. Ct. Crim. App. 1994) (holding “carnal knowledge is not a lesser-included offense of rape, at least where . . . the rape specification does not allege the victim’s age as being under 16, thereby putting the accused on notice to defend against it as well as the principal offense of rape”); *United States v. Baker*, 28 M.J. 900, 900-01 (A.C.M.R. 1989) (treating carnal knowledge as lesser-included offense of rape); MCM, *supra* note 19, pt. IV, ¶ 45d (identifying carnal knowledge as lesser-included offense to rape). *But cf.* MCM, *supra* note 19, R.C.M. 307 (c)(4) discussion (observing “[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person”).

68. *See supra* notes 19-20 and accompanying text.

69. *See supra* notes 23-29 and accompanying text.

70. *See supra* notes 50-61 and accompanying text.

71. *See supra* notes 30-49 and accompanying text.

72. *See* UCMJ art. 134 (1995). The basic form of the offense is such that it does not necessarily lead to “witch hunts” or contribute to licentiousness in the ranks. *But cf.* PRIEST AND GRAHAM, *supra* note 1, at A12 (quoting unidentified retired general officer concerning current interest in adulterous misconduct).

73. *See, e.g.*, Meg Greenfield, *Unsexing the Military*, NEWSWEEK, June 16, 1997, at 80.

74. *Parker v. Levy*, 417 U.S. 733, 743 (1974).

75. *Id.* at 764-65 (Blackmun, J., concurring) (quoting *Fletcher v. United States*, 26 Ct. Cl. 541, 563 (1891)).

76. *Id.* at 765 (Blackmun, J., concurring).